In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. ~~839~~ 70-34

SIERRA CLUB, a California corporation,
Petitioner,

vs.

WALTER J. HICKEL, individually, and as Secretary of the Interior of the United States; JOHN S. MCLAUGHLIN, individually, and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually, and as the Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service, and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on September 16, 1970.

CITATIONS TO OPINIONS BELOW

Neither the opinion of the United States Court of Appeals for the Ninth Circuit (App. A, pp. 1-28) nor the memorandum of decision of the United States District Court for the Northern District of California (App. B, pp. 29-42) has been reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 16, 1970. On October 6, 1970, the Court of Appeals signed an order staying issuance of its mandate pending filing, consideration and disposition of this petition for writ of certiorari, provided that the petition is filed on or before November 6, 1970. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does the Sierra Club, an old and well-established organization with a special interest and competence in matters affecting the scenery, ecology and recreational use of the Sierra Nevada mountains, have standing to sue to prevent federal officials from illegally authorizing acts which would produce permanent damage in Sequoia National Park and Sequoia National Game Refuge located in the Sierra Nevada mountains?

2. Must a conservation organization show threatened damage to itself as an organization, and not merely damage to the aesthetic, recreational or conservation interest of its members and others in order to have standing?

3. Where irreparable harm is inevitable if a preliminary injunction is not granted, must the plaintiff prove a "reasonable certainty" of prevailing on the merits, or is some lesser degree of likelihood adequate to support that injunction?

4. May the Secretary of Agriculture circumvent Congress' 80 acre limitation on long-term permits for the use of national forest land by issuing not only such a long-term permit for 80 acres but also a supplementary permit for facilities occupying much greater acreage, where the supplementary permit is revocable neither in fact nor in law?

5. May the Secretary of the Interior authorize others to construct a major connecting link highway across Sequoia National Park for a non-park purpose?

6. May a statute requiring Congressional approval of any transmission line located in Sequoia National Park be ignored by the Secretary of the Interior?

7. May the Secretary of the Interior lawfully disregard his own rule calling for public hearings on proposed park roads?

8. May the illegal effect of the failure of the Secretary of the Interior to conduct a required public hearing be dispelled because the State Division of Highways conducted a hearing?

9. May the Secretary of Agriculture authorize a huge private resort development in a national game refuge without first finding the proposed use consistent with the mandate of Congress in creating the refuge?

STATUTES INVOLVED

The provisions of law involved are:

Article IV, Section 3, clause 2, Constitution of the United States;

Administrative Procedure Act as amended by Pub. L. 39-554, 80 Stat. 381 et seq., 5 U.S.C. §§ 551(5), 553, 702-706;

Conservation Code, 16 U.S.C. §§ 1, 5, 8, 41, 45c, 497, 551 and 688, codifying 39 Stat. 535, 48 Stat. 389; 36 Stat. 1253, 66 Stat. 95; 43 Stat. 90; 26 Stat. 478; 44 Stat. 820; 70 Stat. 708; 30 Stat. 35, 76 Stat. 1157, 78 Stat. 745; 62 Stat. 861.

Rules for Roadbuilding in National Parks, F.R. Doc. 69-1177 (Jan. 28, 1969).

These laws are set out in Appendix C.

STATEMENT

The Sierra Club is a nonprofit corporation whose growing national membership was approximately 78,000 when the complaint in this matter was filed on June 5, 1969. Approximately 27,000 members then resided in the San Francisco Bay Area (R. 1, 2). One of its principal purposes is the conservation and protection of the natural resources of the Sierra Nevada Mountains (R. 2).

"Environmental Quality", the first Annual Report of the Council on Environmental Quality transmitted to the Congress August, 1970 by President Nixon, lists the Sierra Club prominently among organizations which "...

exist to inform, guide, or represent their members in a wide variety of environmental and conservation matters." (*Id.* at 215).

The Second Circuit has described the Sierra Club as a "national conservation organization with substantial membership . . . and a history of involvement of the preservation of national scenic and recreational resources." See *Citizens Committee for Hudson Valley v. Volpe,* 425 F.2d 97, 103 (1970).

The Sierra Club was aware of the possibility of Forest Service plans for the development of Mineral King in the 1940's (R. 87). The Club became especially concerned in 1965 when it became apparent for the first time that the Secretaries of Agriculture and Interior and their aides were seriously considering a development as massive as that proposed by Walt Disney Productions, Inc. ("Disney").

In 1965, the Sierra Club appointed a member of its staff who was familiar with Mineral King and the development proposal to act as one of its spokesmen. J. Michael McCloskey, the assigned staff member, promptly expressed the Sierra Club's concern about the development proposal, and requested public hearings on the subject. The requests were denied. The record includes letters and a telegram dealing with these requests (R. 81-87).

Subsequently, when it became apparent that hearings would not be held, and that the Disney proposal, together with all of its ramifications (power lines, new roads, adverse effects upon animal and plant life, etc.) was to be

approved, the Sierra Club filed this lawsuit for declaratory relief and to enjoin the Secretaries and their aides from issuing permits.

There is no suggestion in the record that the Club did not fully exhaust its administrative remedies prior to filing the suit; or that the controversy was not "ripe"; or that the Sierra Club will not vigorously and adequately present its position that the Secretaries are acting in excess of their statutory powers.

The jurisdiction of the District Court was invoked under Section 10 of the Administrative Procedure Act, 5 U.S.C. §§701-706; the Federal Question Statute, 28 U.S.C. §1331(a), the 1962 Mandamus Act, 28 U.S.C. §1361 and the Declaratory Judgment Act, 28 U.S.C. §2201. Jurisdiction of the Ninth Circuit was based upon 28 U.S.C. §1292(a)(1).

To understand why the Secretaries' proposed action conflicts with the special legislation which controls the use of Mineral King, one must understand something about the area.

Mineral King Valley is in the Sierra Nevada Mountains, surrounded on three sides by Sequoia National Park. The bottom of the Valley lies at about 8,000 feet; surrounding peaks range to approximately 12,000 feet. Geographically and ecologically, Mineral King is part of Sequoia National Park (R. 66). Due to the existence of mining claims in the Valley, Congress did not formally include Mineral King when the surrounding land was incorporated into the Park in 1926. However, at that time, it did designate the entire Mineral King enclave as Sequoia National Game Refuge (R. 82).

In January, 1966, without hearings, the Disney proposal was chosen over those of five other bidders and Disney received a temporary planning permit. While the solicitation was for a facility including four ski lifts and resort accommodations for 100 skiers (R. 67), Disney's proposal includes a village incorporating major hotels and lodges for over 3,000 overnight guests, ten restaurants, a chapel, theatre, general store, five story parking facility, hospital and sewage treatment facilities (R. 67, 68, 92-94). Other facilities would include power plants, and associated installations, swimming and ice skating facilities, twenty ski lifts, a cog assisted railroad, avalanche dams and stream control features, and a development scheme which would require "extensive bulldozing and blasting in most lower areas and extensive rock removal at high elevations" and the "grooming and manicuring" of most slopes (R. 72).

The projected daily use of Mineral King by as many as 14,000 persons (R. 186) would produce nearly twice the concentration of persons found in Yosemite Valley on busy days (R. 68).

Mineral King is reached by a low-standard road from Hammond, California constructed to support the mining activities of the 1870s. In the course of its twenty-six mile route from the west, it traverses a portion of Sequoia National Park, which was established in 1890 (16 U.S.C. §41). Agriculture's plan assumes a new highway which would open the way to larger numbers of Disney's paying customers (R. 99. 101, 106).

The proposed plan calls for a major highway across Sequoia National Park. It is represented as consisting

of two lanes with frequent passing lanes (R. 102). However, the record shows that there is reason to believe that this highway capacity will prove to be inadequate. Former Secretary of the Interior Udall said in a letter to former Secretary of Agriculture Freeman in 1968:

> "In addition to our desire to minimize the damage to park values by the road, we are concerned about what we have been told concerning the size of the planned Disney development. Will one two lane road of park standards be adequate, or will Interior later receive a request for another road?" (R. 182).

Consultant John Clarkeson said:

> "Unless some control or other means is considered, this two-lane road does not look at all adequate for a 14,000-a-day visitor load where so many will be one-day visitors." (R. 200).

The new highway in its two-lane configuration in the mountainous area would include "extensive cutting and filling . . . accompanied by extreme back slopes and embankment slopes to accomplish a stable earthwork condition . . . [E]mbankments as much as 600 feet and 700 feet wide at the bottom of the prism are required to hold up a mere 28 feet for highway width." (R. 193, 194). The fragile nature of the area through which the highway would pass guarantees that the scars produced would be very slow to heal (R. 185).

As of October 24, 1967, the State of California committed $22,000,000 of state gas tax funds for the construction of the new highway which would dead-end at Mineral King (R. 69), but the Secretary of the Interior opposed the section which would cut across Sequoia

National Park and urged that a better alternative be found (R. 106-108). He later acquiesced in its location within the Park only reluctantly (R. 181).

On January 27, 1969, the Secretary of Agriculture, through his Forest Service aides, approved Disney's plan and stated that a thirty-year term permit for 80 acres of game refuge and an accompanying permit for the additional acreage would issue automatically upon execution by the State of California of the first contract for construction of a significant portion of the new highway (R. 68). Soon after, Interior threatened to issue the highway permit to the State (R. 69) which would have set the entire project in motion. It also threatened to authorize a transmission line in the Park without first obtaining Congressional approval (R. 89). At this stage, the Sierra Club sought a preliminary injunction.

District Judge William T. Sweigert probed the matter in the course of hearings on two days and found that the Club had raised serious and substantial questions concerning the statutory authority of the defendants to permit the threatened massive alterations of Sequoia National Park and Game Refuge. He found that there was an imminent threat of irreparable harm and that preservation of the *status quo* required issuance of a preliminary injunction (App. B, p. 41).

The Court of Appeals disagreed. It held that the Sierra Club lacked standing to prosecute this lawsuit. It also held that the Secretaries had acted properly and that the Sierra Club had shown no threat of irreparable injury to itself or anyone else arising from the Secretaries' proposed action.

REASONS FOR GRANTING THE WRIT

1. THE NINTH CIRCUIT'S DECISION ON STANDING CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

In its decision on standing, the Ninth Circuit has split with controlling decisions of this Court, and the decisions of other circuits.

The most obvious conflict is between the opinion in this case and the decision of the Second Circuit in *Citizens Committee for the Hudson Valley v. Volpe,* 425 F.2d 97 (1970). The Ninth Circuit recognizes the conflict in its opinion:

> "To the extent to which *Citizens Committee for Hudson Valley v. Volpe* indicates that the Sierra Club has standing within the 'private Attorney Generals' rule, we respectfully disagree." (App. A, p. 17, footnote 9).

The cases are indistinguishable. In each, the Sierra Club was a plaintiff. In each, it alleged that a government official (undoubtedly invested with broad authority and discretion in many areas) had overstepped the bounds of his authority in a particular area in which Congress had seen fit to narrow and restrict the scope of that discretion. In each, the objective of the lawsuit was to prevent unauthorized and unlawful destruction of an important scenic and recreational resource. In each, the Sierra Club had a number of members in the general area of the proposed construction. In neither case did the Sierra Club show direct pecuniary interest. In the Second Circuit, the Sierra Club had standing. In the Ninth Circuit, wherein lie the Sierra Nevada Mountains

from which the Sierra Club takes its name, the Sierra Club was held to lack standing.

The decision in this case also conflicts with the D.C. Circuit's decision in *Environmental Defense Fund, Inc. v. Hardin,* 428 F.2d 1093 (D.C. Cir. 1970). In that case, all of the parties seeking review were conservation organizations of one type or another, the Sierra Club among them. They were found to have standing. The Court said, inter alia:

> ". . . the consumers' interest in environmental protection may properly be represented by a membership association with an organizational interest in the problem.
>
> "On the basis of petitioners' uncontroverted allegations, it appears that they are organizations with a demonstrated interest in protecting the environment from pesticide pollution. Therefore they have the necessary stake in the outcome of a challenge to the Secretary's inaction to contest the issues with the adverseness required by Article III of the Constitution." (428 F.2d at 1097; footnotes omitted).

The issue in this case is not academic. We have learned with shocking suddenness that the land, the air and the water are finite. We learn that America the Beautiful can be America the Ugly unless positive steps are taken to preserve it. Congress has expressed its commitment to conservation repeatedly over the years since early conservation efforts led to the creation of the National Park System.

The Secretaries are under pressure to commit public lands to commercial exploitation, both to justify budgetary requirements of their agencies and to please powerful

and persuasive applicants for development permits. In dealing with large areas of ordinary federal lands, the Secretaries have broad discretion. In dealing with Sequoia National Park and Sequoia National Game Refuge, their discretion is greatly limited by statute because those portions of the public lands are not merely valuable real estate but a priceless national resource.

Where a federal official has in fact acted in excess of his statutory authority, or contrary to it, there is only one effective remedy: A lawsuit. Since Congress has already expressed its will in the statute, and the officer has equally expressed his intention to disregard the will of Congress, the remedy (if there is to be one) must be in the courts.

A narrow interpretation of "standing" means that many types of lawless administrative action will remain beyond the reach of justice. Here, the question is especially important because, unless defendants' lawlessness can be curbed now, it can never be curbed at all. The proposed changes in topography and vegetation of the Mineral King area, to be achieved with blasting powder, bulldozers and chain saws, will be irreversible and irreparable for all the foreseeable future.

Moreover, the Sierra Club is the only actual (or indeed likely) spokesman for the public interest in the preservation of Mineral King from the effects of illegal action. If the public interest is to have any meaningful representation in a decision which will have lasting and irreversible consequences for the disposition of the public lands, then the Sierra Club, or some comparable organizations, must have an opportunity to be heard.

The issue here is not a choice between the Sierra Club and a more appropriate plaintiff but between the Sierra Club and nobody. Cf. *Alderman v. United States,* 394 U.S. 165 (1969).

The standing of responsible conservation groups such as the Sierra Club has been recognized in a series of ground-breaking cases in this Court and in the other Courts of Appeal. See especially *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150 (1970); *Citizens Committee for the Hudson Valley v. Volpe,* 425 F.2d 97 (2d Cir. 1970); *Scenic Hudson Preservation Conference v. FPC,* 354 F.2d 608 (2d Cir. 1965); *Parker v. United States,* 307 F.Supp. 685 (D. Colo. 1969).

The Ninth Circuit's attempt to distinguish these key cases is transparently feeble. After conceding that the interest which entitles a plaintiff to standing may be "aesthetic, conservational and recreational," the Ninth Circuit reverts to Black's Law Dictionary (4th Edition) for a definition of "aggrieved." (App. A, p. 16, footnote 8). It ignores the cases which define "adversely affected or aggrieved" in the precise legal context here in issue—citizens' groups championing conservational interests.

The Ninth Circuit has attempted to distinguish the *Citizens Committee* and *Parker v. United States* cases, *supra,* on the following grounds:

> "In both of these cases, however, the Sierra Club was joined by local conservationist organizations made up of local residents and users of the area affected by the administrative action." (App. A, p. 17).

But who, if not the Sierra Club, is the "local organization" concerned with the preservation of the Sierra Nevada Mountains? Who, if not Sierra Clubbers, are the users of this remote and beautiful area? Must the Sierra Club introduce into evidence (on a motion for preliminary injunction) the literature which it has published on the Sierra Nevada over a period of 80 years in order to sustain its standing? Should it have called as witnesses its members who have hiked the high country of Mineral King? Should it have introduced the record of its participation in the expansion of Sequoia National Park and the creation of Sequoia National Game refuge in 1926? Or is it enough, as other circuits have held, that the Sierra Club is a substantial and serious conservation organization?

In any event, if the Ninth Circuit's requirement that "local residents and users" be joined with the Sierra Club is the touchstone of its standing, the only likely result will be routine joinder of a local resident (or an ad hoc conservation committee) in any future conservation case. A viable rule cannot rest upon such a fragile distinction. Either the Sierra Club has standing in its own right, or it does not. The question is an important one, and this court should decide it.

On a more technical but no less important level, the Ninth Circuit's Mineral King decision conflicts with the decision of the District of Columbia Circuit in *Scanwell Laboratories, Inc. v. Shaffer,* 424 F.2d 859, 861 (1970). In that case the D. C. Circuit held that the plaintiff had standing to challenge a government contract award to an allegedly ineligible bidder even though it would *not* be

entitled to the contract itself if successful. The suit was permitted under the "private attorney general" theory which the Ninth Circuit here rejects. In *Scanwell,* the court noted, in discussing *Flast v. Cohen,* 392 U.S. 83 (1968):

> "Thus, in spite of the fact that the Supreme Court has not yet chosen to hold that the Administrative Procedure Act applies to all situations in which a party who is in fact aggrieved seeks review, regardless of a lack of legal right or specific statutory language, it is clearly the intent of that Act that this should be the case. . . .
>
> "Of course it is true that the grant of standing must be carefully controlled by the exercise of judicial discretion in order that completely frivolous lawsuits will be averted. There must be a practical separation of the meritorious sheep from the capricious goats—a recognition that *cucullus non facit monachum.* However, responsible federal judges will be able to discern a case in which there is injury in fact, a sufficient adversary interest to constitute a case or controversy under Article III, and an otherwise reviewable subject matter to prevent dockets from becoming overcrowded. The court should have discretion to grant standing, provided the other criteria listed above are properly met.
>
> "The spectre of opening a Pandora's box of litigation has always seemed groundless to us, particularly in the area of standing to sue. . . ." (424 F.2d at 872).

In attempting to distinguish other cases contrary to its position, the Ninth Circuit raises a host of other subsidiary conflicts and incongruities. For example:

1. The Ninth Circuit attempts to distinguish *Scenic Hudson Preservation Conference v. FPC,* 354 F.2d 608 (2d Cir. 1965) on the grounds that the "aggrieved" language in § 313(b) of the Federal Power Act provides a statutory aid to standing. But *Citizens Committee for the Hudson Valley v. Volpe,* 425 F.2d 97, 104 (2d Cir. 1970), makes it clear that the Second Circuit has now concluded that the "adversely affected or aggrieved" language in the Administrative Procedure Act (5 U.S.C. § 702) is sufficient to confer standing *without* further "statutory aid." Cf. *Scanwell Laboratories, Inc. v. Shaffer,* 424 F.2d 859, 872 (D.C. Cir. 1970).

2. The Ninth Circuit attempts to distinguish *United Church of Christ v. FCC,* 359 F.2d 994 (D.C. Cir. 1966) on the ground that the broadcast listeners were "consumers." It fails to show why the Sierra Club members and other recreational users for whom it often speaks are not equally "consumers" of unspoiled, undeveloped natural beauty as suggested by *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150 (1970).

3. The Ninth Circuit attempts to distinguish *Powelton Civic Home Owners Association v. Department of HUD,* 284 F.Supp. 809 (E.D. Pa. 1968) on the grounds that in *Powelton* the parties with standing were parties to be displaced by the urban redevelopment, while the Sierra Club has failed to show that it has property in Mineral King which is about to be demolished. That is certainly an extraordinary argument in view of the fact that Mineral King is almost completely unpopulated at this time, and that the Sierra Club is objecting to development of the area, at least along the line proposed by

the Disney corporation. As pointed out in *Shannon v. Department of HUD,* 305 F.Supp. 205, 208-209 (E.D. Pa. 1969), it is the people in the *neighboring* area, not the people displaced by the urban renewal project, who have standing to contest the purpose to which the redevelopment area is put. The people who have been dispossessed have little interest, if any, in the land once they have been cleared off and forced to move elsewhere. In the case at bar, the major parties likely to object to Mineral King are somewhere else. Cf. *Baker v. Carr,* 369 U.S. 186 (1962). Almost by definition, conservation cases arise in circumstances in which the threatened land is *not* heavily populated, and the question is whether it should be. To restrict standing to the residents of the area is to restrict it to almost no one.

4. The Ninth Circuit attempts to dispose of *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150 (1970) as a "competitor's suit." That it was. But so, in a very practical sense, is the case at bar. As the Ninth Circuit is at pains to point out, the Far West Ski Association supports the action taken by respondent Secretaries. The interests of the skiers doubtless compete with those of the Sierra Club in this case. So, too, do the interests of the Secretaries in maximizing profit from particular lands under their stewardship compete with the Congressional concern for the preservation of a priceless national heritage of unspoiled scenic splendor. The Ninth Circuit must mean, when it concedes standing in a "competitor's suit", that the competition must be commercial—i.e. that the plaintiff's interest must be pecuniary. But the *Data Processing* case, *supra,* laid

that idea to rest when it included "aesthetic, conservational and recreational" interests among those which a private organization has standing to assert.

In the conservation field, standing is a concept of crucial significance. If left unreversed, this case will cripple the efforts of conservation groups to represent the public interest in forcing federal officials to adhere to the Congressional mandates under which they purport to function.

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2. THE STANDARD FOR PRELIMINARY INJUNCTION APPLIED BY THE NINTH CIRCUIT CONFLICTS WITH THAT OF OTHER CIRCUITS.

The Ninth Circuit decided that the Sierra Club was required to show a "reasonable certainty" that it would prevail in order to justify a preliminary injunction. It held that the District Court abused its discretion by not adhering to that standard. This holding created a direct conflict with other circuits.

In support of the "reasonable certainty" test, the Ninth Circuit cited *H. E. Fletcher Co. v. Rock of Ages Corp.*, 326 F.2d 13 (2d Cir. 1963), *Garlock, Inc. v. United Seal, Inc.*, 404 F.2d 256 (6th Cir. 1968), which echoed *H. E. Fletcher, supra,* and *Hall Signal Co. v. General Ry. Signal Co.*, 153 F. 907 (2d Cir. 1907). Describing petitioner's burden as "persuasive demonstration", it also cited *District 50, United Mine Workers v. International U., U.M.W.*, 412 F.2d 165 (D.C. Cir. 1969) and *Udall v. D. C. Transit System, Inc.*, 404 F.2d 1358 (D. C. Cir. 1968).

It failed to cite the leading case of *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738 (2d Cir. 1953) in which Judge Frank said

> "To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (i.e., the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." (206 F.2d at 740).

The fact that other circuits are in conflict with the Ninth Circuit is established in *Unicon Management Corp. v. Koppers Co.*, 366 F.2d 199 (2d Cir. 1966). In that case, the Second Circuit states:

> "We reaffirm our holding in H. E. Fletcher Co. v. Rock of Ages Corp., 326 F.2d 13, 17 (2 Cir. 1963), that the party seeking a preliminary injunction has a 'burden of convincing [the court] "with reasonable certainty" that it "must succeed at final hearing." Hall Signal Co. v. General R. Signal Co., 153 F. 907, 908 (2 Cir. 1907," *where, as there, it appears that a 'lack of adequate showing of irreparable damage' also exists.* But we do not think that what was said in *Fletcher* is a departure from the more generally accepted statement of the rule that 'it will ordinarily be enough that the plaintiff [defendant here] has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation,' where, as here, 'the balance of hardships' tips decidedly toward the party requesting the

> temporary relief. Hamilton Watch Co. v. Benrus Watch Co., supra, 206 F.2d at 470. The likelihood of success is 'merely one strong factor to be weighed along with the comparative injuries of the parties.' 3 Barron & Holtzoff, Federal Practice & Procedure § 1433, at 493 (1958)." (*Id* at 204, 205) (emphasis added)

This case makes clear that where, as in the matter at bar, irreparable harm is imminent, the *H. E. Fletcher* and *Hall* test is inapplicable. Also inapplicable is the similar "convincing presentation" test. *District 50, United Mine Workers v. International U., U.M.W., supra,* following *Udall v. D. C. Transit System, Inc., supra,* cites the *Unicon* decision with approval and imposes the strict proof requirement because "the showing of irreparable harm is weak." (412 F.2d at 168). *Udall* was a case similarly devoid of a showing of irreparable harm.

The issues in each case must be:

(1) Have serious questions of illegality been raised which go to the merits, and

(2) Is there an imminent threat of irreparable harm which a preliminary injunction would forestall?

The District Court answered "yes" on both issues.

Subsequent sections of this petition include the serious questions of legality which were raised by the Sierra Club along with the treatment of those questions by the Ninth Circuit. Concerning the other issue, that court was content to say, without explantation, that there has been no showing that the Sierra Club "or anyone else will suffer irreparable injury" (App. A, p. 27).

The District Court found an imminent threat of irreparable injury. It received preliminary evidence of the effects of the plans which the grant of permits by the Secretaries would set in motion. That evidence included several internal memoranda of the Forest Service, one of which stated that:

> "The total basic concept of development appears badly biased in orientation toward a highly artificial, continued situation, without any real attention to ecological factors and needs to multiple use management. The extent and nature of proposed alteration of the basin is unacceptable to us—the damages extend beyond effects on fish and wildlife, and these alone are critical" (R. 174).

The evidence also included a study by Dr. Richard J. Hartesveldt concerning the effects of the new highway upon the ecology of sequoia groves within the Park in which he said that

> ". . . there are a total of at least 103 giant sequoias below the proposed highway. Of these, 45 are in a position of possible jeopardy because of road construction" (R. 128).

It is only necessary to envision the effects of extensive bulldozing and blasting, stream diversion, avalanche dams and the grooming and manicuring of slopes to understand that if the District Court had permitted all of this to proceed, later proof that it had been done illegally would have been of no value.

Finally, the District Court found that Interior was ready to issue a permit to the State to build the highway which would automatically trigger issuance of the Forest

Service permits. Thus, the *status quo* was about to be changed dramatically.

The Court carefully tailored the preliminary injunction so that it did not interfere with activities connected with planning. It barred only physical disturbance of the Park and Game Refuge.

We submit that, having identified the proper tests for preliminary injunction, the District Court properly applied them; further, that use of an improper standard led the Ninth Circuit into error in assessing each of the grounds upon which the injunction was granted.

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3. THE NINTH CIRCUIT'S DECISION HAS REPEALED THE STATUTE LIMITING THE SIZE OF DEVELOPMENTS IN NATIONAL FORESTS.

In 16 U.S.C. §497, Congress authorized the Secretary of Agriculture to permit the use of parcels of not more than 80 acres of national forest land for periods not exceeding thirty years for recreation.

The District Court reviewed this statute and its legislative history, and found an unambiguous Congressional intention to limit the size of long term recreational developments within national forests. The Ninth Circuit did not challenge this finding.

The District Court also construed 16 U.S.C. §551, under which the Secretary may regulate the occupancy and use of the national forests. It held that, under that section, the Secretary may not issue a permit such as the supplementary permit proposed in this matter which is not in

terms and in fact revocable at will. The Ninth Circuit disagreed and, in so doing, erred.

That Disney intends to locate permanent facilities including ski lifts and towers, sewage treatment facilities and parking structures on lands outside those covered by the 80-acre term permit is not disputed. Disney plans to locate these major, permanent improvements on land covered by a separate, supplemental permit covering 13,000 acres (R. 120, 121).

The District Court examined the supplemental permit in conjunction with the regulations which afford appellate review of its termination and found that it did not appear to be revocable at will. The District Court's conclusion was buttressed by the realities of a situation in which revocation of the permit would effectively destroy the value of the facilities covered by the 30-year term permit and, thereby, the entire 35 million dollar investment contemplated by Disney.

The Ninth Circuit apparently acknowledged that the supplementary permit is *not* revocable at will, but suggested that it need not be. This suggestion is at the heart of the Ninth Circuit's decision reversing the District Court. The decision has the effect of repealing 16 U.S.C. §497; it is at odds with Article IV, Section 3, clause 2 of the United States Constitution which vests exclusive power over public lands in the Congress; and it is in conflict with relevant opinions of the Attorney General.

The Ninth Circuit rejected an opinion of the Attorney General which had been cited to the District Court by the Secretary of Agriculture (35 Op. Atty. Gen. 485 (1928)), instead placing great reliance upon another At-

torney General's opinion written in 1905, which includes the following statement:

> "The legislation expressly referring to forest reservations is silent with reference to the period for which the permits may be granted, and my attention has not been called to any other statutory provision which can be said to limit your action in this connection." (25 Op. Atty. Gen. 470, 472 (1905)).

The legislative silence which in 1905 permitted the Attorney General to sanction permits which were not revocable at will was ended ten years later when Congress enacted 16 U.S.C. §497. This section established clear limits of power which the Secretary of Agriculture could not circumvent by issuing supplementary permits not truly revocable at will.

While he was the Attorney General, Chief Justice Harlan Fiske Stone was asked to review an agreement between the Secretary of the Navy and a licensee of certain government owned patents. He reviewed the Constitutional limitation upon the disposal of public property, cited authorities for the proposition that disposal includes a lease and stated that

> "No public property can, therefore, be disposed of without the authority of law, either by an express Act of Congress for that purpose, or by giving the authority to some Department of the Government, or subordinate agent." See also *Wisconsin R. Co. v. Price County,* 133 U.S. 496, 504. . . . [t]his prohibition extends to any attempt to alienate a part of the property, or in general, in any manner to limit or restrict the full and exclusive ownership of the United States therein" (34 Op. Atty. Gen. 320, 322 (1924)).

He found that the executive may grant a license, and also the limitations upon that licensing power, as follows:

> "But, as pointed out in 22 Op. 240, 246, the power to issue such revocable licenses, inasmuch as they vest no estate, interest, or franchise and confer no right whatever to the continuance of the permission thereby given, has been habitually exercised as an incident of the power of management and control, whenever, in the Secretary's judgment, the permission will subserve the interests of the Government. In that opinion are collected numerous instances of the granting of such revocable licenses for the use of portions of Government lands, and the opinion itself sustained the issuance of a revocable license * * * to lay a single track on the Aqueduct reservation near Cabin John Bridge.
>
> "Whether * * * the determinable occupancy of the land * * * is or is not a benefit to the Government * * * is a question for the exercise of the judgment of the official vested with the power rather than a question of law to be determined in advance by the law officers of the Government * * *. It being clearly understood that such permission creates no right, interest, or franchise in the license and that, however long continued, *the occupancy is subject in theory and in fact to immediate termination at any time at the will of the Government.* I am of opinion that you have power to issue a revocable license." (Id. at 327, 328.) (Emphasis added.)

This limitation of power applies to all departments of government. Without it there would be no point to the statutes placing limits upon the use of public lands. The pernicious effect of the Ninth Circuit's decision thus transcends the land-use statutes involved in this case.

Reference by the Ninth Circuit to 84 other recreational developments on Forest Service lands in which a combination of term and revocable permits is employed is neither relevant nor convincing proof of the legality of those developments. The record does not show that the other developments are factually or legally comparable.

More importantly, the Circuit Court misconstrues the challenge of the Sierra Club. It does not contend that the Secretary of Agriculture lacks authority to issue fully revocable permits for the use of public lands as part of his overall managerial authority. Nor does it contend that a use may not involve the coupling of term and terminable permits. This was not a finding, or even a premise, of the District Court.

The legality of the actions threatened in this particular case was challenged because, as a matter of law, the supplemental permit would not have been revocable at will. As a matter of fact, it would have been so inexorably tied by money, improvements and use to the thirty year term permit that its own illegal term would have been exactly the same.

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4. THE NINTH CIRCUIT HAS APPROVED USE OF A NATIONAL PARK FOR A NON-PARK PURPOSE

The proposed highway, which would cut a new swath across Sequoia National Park, would connect two points already joined by a substandard road. The Ninth Circuit accepts the new highway because the present road "is legal" and because no authorities have been cited to prove that this should not determine the question.

First, the existing road is neither "legal" nor "illegal" in the sense employed by the Ninth Circuit. The Secretary of the Interior was not called upon to authorize it, since it was in existence when Sequoia National Park was established. It simply was there when the Park was created and it remains.

Second, even if the existing road had been authorized by the Secretary, operating within his authority, that could not determine the legality of every other highway connecting the same points. If this were the law, as suggested by the Ninth Circuit, any number of highways would automatically be legal whatever their route, size or even purpose as long as they had termini in common with the first road.

Third, the authority which the Ninth Circuit should have applied to this matter was 16 U.S.C. §1 which was enacted in 1916 and which permits the Secretary of the Interior "to promote and regulate the use" of parks only

> ". . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which *purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment for future generations.*" (Emphasis added).

Congress has insisted by this law that all changes in National Parks meet the test of serving a park purpose. Every act of the Secretary of the Interior involving the parks must be accompanied by a finding that a park

purpose is served, including acts pursuant to 16 U.S.C. §8 under which he may construct roads and trails.

Interior has not found that the new highway would satisfy a park purpose. The National Park Service has no plan to develop the portion of the Park touched by the highway. (R. 77). Interior Secretary Stewart Udall was pressured to approve it because, while the route across the Park was not the only available avenue, it was the cheapest (R. 106, 107). At a trial on the merits, the Sierra Club expects to prove that Secretary Udall and his subordinates fought long and hard against the road *because* it would not conserve scenery or natural and historic objects and wildlife.

Congress has granted Interior no power to issue permits to *third parties* for construction of a highway in a park. That only the Secretary may construct roads in national parks is reflected in 16 U.S.C. §8, which reads:

> "The Secretary of the Interior, in his administration of the National Park Service, is authorized to construct, reconstruct, and improve roads and trails, inclusive of necessary bridges, in the national parks and monuments under the jurisdiction of the Department of the Interior. Apr. 9, 1924, c. 86, § 1, 43 Stat. 90."

This clear limitation, coupled with the general prohibition against the disposition of public property by the executive where Congress has not expressly authorized it, bars the proposed permit grant to the state.

The new highway would not trace old ecological scars (R. 114, 115). In order to produce a high volume of traffic, the proposed highway must be on a new routing, with new and much larger cuts, fills and structures, all

productive of an adverse effect upon scenery and ecology (R. 185).

The highway would violate Interior's own administrative guidelines because its sole function is to serve as a connecting link. Interior's Park Road Standards Committee put the matter succinctly as follows:

> ". . . Park roads are not continuations of the State and Federal network. *They should neither be designed—nor designated—to serve as connecting links. Motorists should not be routed through park roads to reach ultimate destinations.*" (Park Road Standards, U.S. Department of the Interior, National Park Service, May, 1968.)

Congress has expressed itself on the subject. Referring to a proposed highway across the Padre Island National Seashore which would connect with existing road systems, the House Committee of Interior and Insular Affairs was

> ". . . of the opinion that to require the National Park Service to construct a through highway for general public convenience in the Padre Island National Seashore would give it a function which does not properly belong to it" (1962 U.S. Code Cong. Serv. p. 2717).

The Secretary alone may construct roads in national parks and only those roads which are conceived to serve a park purpose. Here, to satisfy a non-park purpose, he threatened to authorize a third party (the State Division of Highways) to construct a major highway cutting a destructive swath through park land which Congress had designated for preservation in its natural state. The illegality of this plan is clear.

5. INTERIOR, IN FAILING TO CONDUCT HEARINGS, HAS VIOLATED ITS OWN RULES AND ABUSED ITS DISCRETION.

On January 29, 1969, the Secretary of the Interior adopted and published regulations entitled "Roadbuilding in National Parks" (34 Fed. Reg. 19 (January 29, 1969)). These regulations, quoted in relevant part in Appendix C, call for both a corridor and a design public hearing in the case of "each major road project that would have a substantial social, economic, or environmental effect."

When the project involves improvement of an existing road, a single hearing is called for "if the project would have a substantial social, economic, or environmental effect."

The application of these rules to the proposed high-volume road could hardly be clearer. Under them, the Secretary of the Interior would have had no choice but to grant a hearing prior to issuing a permit for its construction. It is an elementary principle of administrative law that an agency must comply with its own regulations and that agency action taken in defiance of its own regulations is invalid without regard to the merits of the decision reached. *SEC. v. Chenery Corp.*, 318 US 80 (1942); cf. *Pacific Molasses Co. v. FTC*, 356 F.2d 386, 387, 389 (5th Cir. 1966).

But the Secretary of the Interior, on April 21, 1969, purportedly revoked the "Roadbuilding in National Parks" regulations, "effective immediately." His "revocation", as published in 34 Fed. Reg. 6985 (April 26, 1969) reads, in its entirety, as follows:

"Office of the Secretary
"ROADBUILDING IN NATIONAL PARKS
"Revocation of Procedures

"Notice is hereby given that the procedures adopted on January 18, 1969, and published in the FEDERAL REGISTER on January 29, 1969, 34 F.R. 1405, regarding the location and design of major road projects in the National Park System administered by the Department of the Interior are revoked, effective immediately.

"Issued in Washington, D.C. on April 21, 1969.

WALTER J. HICKEL,
Secretary of the Interior"

By statutory definition, repealing a rule is just as much "rule making" as formulating it in the first place. (5 U.S.C. § 551(5)). Secretary Hickel's "revocation" is completely inadequate and improper on numerous grounds.

1. It does not give notice of proposed rule-making as required by 5 U.S.C. § 553(b). See also *Pacific Coast European Conference v. United States*, 350 F.2d 197 (9th Cir. 1965);

2. It does not include a statement of the time, place, or nature of public rule-making proceedings as required by 5 U.S.C. §553(b) (1);

3. It does not make a reference to the legal authority under which the rule (revocation) is proposed, as required by 5 U.S.C. §553(b) (2);

4. It completely deprives interested persons of any opportunity to participate in the proposed rule-making in any way, shape or form, in violation of 5 U.S.C. §553(c).

The purported "revocation" of the previous rule governing hearings on park roads was invalid and ineffective. The previous rule remains in effect. The Secretary's failure to comply with his own regulation was a continuing violation of law, arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law within the meaning of 5 U.S.C. §706(2).

The Ninth Circuit dealt with this failure to hold the required hearing only to the extent of finding that "[t]he existence of any such requirement upon the Secretary of Interior or the Secretary of Agriculture is unclear" (App. A, pp. 25, 26). We are asked to be unconcerned because the State of California conducted a hearing in 1967 and the Tulare County Chamber of Commerce held a meeting in 1953 to promote a project.

The 1967 State Division of Highways hearing was not the forum in which to examine limits upon the powers of the Secretary of the Interior, who, at that time, remained adamant in his opposition to the highway (R. 106).

Much less was the Tulare County Chamber of Commerce pep rally of 1953 (R. 83) a hearing in which the purposes of the 1969 regulations of the Secretary of the Interior could be satisfied.

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6. CONGRESS ALONE MAY AUTHORIZE A TRANSMISSION LINE WITHIN SEQUOIA NATIONAL PARK

In dealing with the decision of the District Court, the Ninth Circuit was confronted with the clear language of 16 U.S.C. §45(c) which says that, in Sequoia National Park, Congress must authorize construction of transmis-

sion lines. It sought to avoid the effect of that language by referring to a general section dealing with permit authority for electric poles and lines (16 U.S.C. §5). It found that the Secretary of the Interior may authorize a transmission line in the Park without Congressional action because it was unlikely that it was the "intention to require an act of Congress for each electrical line within the park . . ." (App. A, p. 25).

First, to clear away any spectre that Congress obviously could not have intended to assume the burden of considering each electrical line, the law reads that Congressional authority is necessary not for every *electrical* line but only for a *transmission* line. Second, to read 16 U.S.C. §45(c) is to reject the claim that the only transmission lines which must receive Congressional approval are those connected with hydroelectric facilities in the Park. It says that

> ". . . no permit, license, lease, or authorization for . . . transmission lines . . . *or* for the development, transmission, or utilization of power within the limits of said park . . . shall be granted or made without specific authority of Congress."

If the intention suggested by the Ninth Circuit were correct, the phrase "transmission lines" could have been omitted.

The ruling of the District Court accorded with the clearly expressed intention of Congress and it was error for the Ninth Circuit to rule otherwise.

7. AUTHORIZATION OF DISNEY'S HUGE RESORT IN A NATIONAL GAME REFUGE WAS ILLEGAL

The Ninth Circuit dismissed the contention of the Sierra Club that Mineral King's status as a National Game Refuge prevents its use as the site for an extensive Commercial development. It did so, quoting the first portion of the law through which Congress established the Refuge, but omitting its provisos. The following quotation from the relevant portion of 16 U.S.C. §688, reflects the true intention of Congress:

> "[The lands] *are designated as the Sequoia National Game Refuge,* and the hunting, trapping, killing, or capturing of birds and game or other wild animals upon the lands of the United States within the limits of said area shall be unlawful, except under such regulations as may be prescribed from time to time by the Secretary of Agriculture: *Provided,* That it is *the purpose of this section to protect from trespass the public lands of the United States and the game animals which may be thereon,* and not to interfere with the operation of the local game laws as affecting private or State lands: *Provided further,* That the lands included in said game refuge shall continue to be parts of the Sequoia National Forest and nothing contained in this section shall prevent the Secretary of Agriculture from permitting other uses of said lands under and in conformity with the laws and rules and regulations applicable thereto *so far as may be consistent with the purposes for which said game refuge is established.* July 3, 1926, c. 744, § 6, 44 Stat. 821; June 25, 1948, c. 645, § 13, 62 Stat. 861." (16 U.S.C. § 688). (Emphasis added)

No federal official previously has sought to authorize a private construction project including ski lifts, manicured

slopes, hotels and lodges, 10 restaurants, a chapel, convenience specialty shops, conference center, swimming pools, theatre, general store, 5-story parking facility, hospital, sewage treatment plant, housing for 800 employees and 14,000 customers on a National Game Refuge.

California Fish and Game Commission personnel have stated "that in an extensive development such as the Disney proposal, considerable wildlife habitat would be lost and wildlife would suffer from human encroachment." (R. 119).

Agriculture has made no finding that the proposed ski resort is a use consistent with the National Game Refuge. This failure was arbitrary and capricious. Moreover, a finding that Disney's "wonderland" was a use consistent with the purposes for which the Game Refuge was established would have been an abuse of discretion, and more than slightly embarrassing to articulate. Congress intended not only to protect animals but to preserve their *habitat*.

A trial on the merits will show that the migratory cycle of deer and other animals found in and around the Park includes the Mineral King area. Commercial development on the scale threatened and 14,000 persons at one time are not responsive to a Congressional mandate to protect the land from trespass and to maintain it as a *refuge* for game.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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(Appendices Follow)

Appendix A

Corrected October 16, 1970

United States Court of Appeals
For the Ninth Circuit

SIERRA CLUB, a California corporation, *Appellee*, vs. WALTER J. HICKEL, individually, and as Secretary of the Interior of the United States; JOHN S. MCLAUGHLIN, individually, and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually, and as the Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service, and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest, *Appellants.*	No. 24,966

[September 16, 1970]

Appeal from the United States District Court
for the Northern District of California

Before: HAMLEY, KILKENNY and TRASK,
Circuit Judges.

TRASK, Circuit Judge:

This is an appeal from an order of the district court granting a preliminary injunction. The action was instituted by a verified complaint filed by the Sierra Club, a non-profit California corporation, against Walter J. Hickel, individually, and as Secretary of the Interior, Clifford M. Hardin, individually, and as Secretary of

Agriculture, and the Superintendent of the Sequoia National Park and Supervisor of the Sequoia National Forest.

The relief sought was a declaratory judgment and preliminary and permanent injunctions enjoining issuance of the permits required for implementation of a plan proposed by Walt Disney Productions, Inc., for a large scale commercial-recreational development in and near Mineral King Valley in the Sequoia National Game Refuge located within Sequoia National Forest in California. The development also involved a proposed road which would in part traverse a portion of Sequoia National Park.

Amicus curiae briefs supporting the position of the defendants-appellants were filed by the United States Ski Association, the Far West Ski Association and the County of Tulare.

Jurisdiction of the district court was asserted under Section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706; under the Federal Question Statute, 28 U.S.C. § 1331(a); the 1962 Mandamus Act, 28 U.S.C. § 1361; and under the Declaratory Judgments Act, 28 U.S.C. § 2201. Jurisdiction of this court rests on 28 U.S.C. § 1292(a)(1) authorizing interlocutory appeals from orders granting injunctions.

A brief summary of the controversy is as follows: In February 1965, the Forest Service of the Department of Agriculture published a prospectus inviting interested parties to submit proposals for the development of an all-year recreational project in Mineral King Valley in the Sequoia National Forest, in accordance with certain minimum requirements as established by the prospectus.

Walt Disney Productions (Disney) and five other bidders submitted proposals in response to the prospectus. After careful study the Secretary of Agriculture determined the Disney proposal to be the best. Thereafter, on October 10, 1966, a special use permit for planning was issued to Disney for a term of three years in order to enable Disney to make the necessary studies to prepare a master plan for the project which would meet with Forest Service approval. The plan was duly submitted and approved by the Forest Service on January 21, 1969, and is the plan that is the subject of this litigation.

In connection with the plan the Department of the Interior has proposed to permit the State of California to construct a new access road to Mineral King Valley. The new highway would be 20.4 miles long, of which 6.5 miles would cross Bureau of Land Management (Department of Interior) land, 9.2 miles would cross Sequoia National Park (Department of Interior) land, 1.8 miles would cross Sequoia National Forest (Department of Agriculture) lands, and the remaining 2.9 miles would cross various parcels of private property. It would approximately parallel the existing Mineral King roadway which appears on the map (See Record, 115) to be a tortuous road now described as substandard. In connection with the project, the Secretary of the Interior also agreed to grant a right of way for electrical transmission lines through the park.

In announcing the master plan and its approval, the Forest Service stated:

> "Our goal is to provide a needed public service so that the scenic, aesthetic, and recreational resources

> of Mineral King can be enjoyed by the American people as part of their heritage. At the same time, we intend to work with the Disney organization to assure that the development can be accomplished without substantial impairment or permanent undesirable ecological impact. We are confident that these twin challenges have been faced in a creative and artistic fashion." (T.R. 52.)

The initial description of the facilities proposed stated that accommodations would be provided for 1,505 overnight guests plus day visitors. A sub-level automobile reception center would be provided outside of the main Mineral King Valley with a cog-assist railway to transport people to the main village. No visitor automobiles would be allowed in Mineral King Valley proper. The announcement of the Forest Service continued:

> "While the Mineral King area is certain to become increasingly popular, its ultimate development will be guided by aesthetic and ecological limitations, rather than market potential. The Disney master plan has been designed with this consideration uppermost."

On the merits, the Sierra Club contends that the Secretary of Agriculture who has the responsibility under Congress for management of the national forests has exceeded his authority and has acted illegally as well as arbitrarily and capriciously in approving the master plan proposed by Disney. It urges that the Secretary of Agriculture's proposal to issue a term permit for an eighty acre parcel for a term of thirty years for construction of improvements such as hotels, pools and parking lots, and to issue a revocable permit for additional acreage upon which

such improvements as ski lifts, trails, and sewage treatment facilities would be built, would constitute illegal action in excess of authority. Second, the Sierra Club asserts that the action of the Secretary of the Interior in his proposal to permit the State of California to construct a road across Sequoia National Park for a distance of 9.2 miles to replace an existing road across the park would be illegal. Finally, the club asserts that no authority exists for the Secretary of the Interior to issue a permit for the construction of a transmission line across the park lands as a part of the master plan.

Encompassing all is the vehement argument of Sierra that the necessary result of the development proposal is the "permanent destruction of natural values" and the "irreparable harm to the public interest." These, it is asserted, are "irreversible effects of administrative lawlessness."

Article IV, Section 3 of The United States Constitution commits the management and control of the lands of the United States to Congress. That congressional power is unlimited. The Supreme Court said in *Gibson v. Chouteau,* 80 U.S. (13 Wall.) 92, 99 (1872):

> "With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations."

See also *Alabama v. Texas,* 347 U.S. 272, 274 (1954).

Congress may delegate the power to manage federal lands to the Executive. *Best v. Humboldt Placer Mining Co.,* 371 U.S. 334, 336-338 (1963). With respect to the national forests, Congress has authorized the Secretary

of Agriculture "to regulate their occupancy and use." Organic Administration Act, 16 U.S.C. § 551. With respect to national parks, Congress has authorized the Secretary of the Interior "to promote and regulate the use" of such parks, to "grant privileges, leases, and permits for the use of land" in the parks, and to cooperate with the Secretary of Agriculture in administering contiguous national forests. Organic Act of the National Park Service, as amended, 16 U.S.C. § 1, *et seq.*

The Secretaries purport to act pursuant to these basic sources of authority, together with supplemental legislative support.

(1) *Standing*

Appellants have raised the threshold question as to whether appellee has sufficient legal standing to bring this action. There is no dispute that Sierra Club is a legally organized and existing corporation. If an interest of such a corporate person, entitled to legal protection, is damaged or denied, that corporation is entitled to redress in the courts.

> "The only problems about standing should be what interests deserve protection against injury, and what should be enough to constitute an injury."[1]

Simply stated but difficult to apply, standing has been called "one of the most amorphous concepts in the entire domain of the public law."[2]

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[1]Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450, 468 (1970).

[2]*Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 861 (D.C. Cir. 1970).

The basic concept of standing was summarized in *Associated Industries v. Ickes,* 134 F. 2d 694, 700 (2d. Cir. 1943) as follows:

> "In a suit in a federal court by a citizen against a government officer, complaining of alleged past or threatened future unlawful conduct by the defendant, there is no justiciable 'controversy,' without which under Article III, § 2 of the Constitution, the court has no jurisdiction, unless the citizen shows that such conduct or threatened conduct invades or will invade a private substantive legally protected interest of the plaintiff citizen; such invaded interests must be either of a 'recognized' character, at 'common law' or a substantive private legally protected interest created by statute."

In that same case, in order to reconcile previous decisions of the Supreme Court where an individual was permitted to assert a position which appeared to protect a public interest rather than a traditional, substantive legally-protected interest of a citizen-plaintiff, the court suggested the "private Attorney Generals" theory, as follows:

> "While Congress can constitutionally authorize no one, in the absence of an actual justiciable controversy, to bring a suit for the judicial determination either of the constitutionality of a statute or the scope of powers conferred by a statute upon government officers, it can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public

> or the government. Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then in like manner there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals." 134 F. 2d at 704.

Such a notion would support the rationale of many cases, but not all. More recently, the amendment to the Administrative Procedure Act, and particularly Section 10, thereof, 5 U.S.C. §§ 701-706, together with a profusion of cases relying upon it and interpreting it, have developed new precedents on the law of standing. See, e.g., *Barlow v. Collins,* 397 U.S. 159 (1970); *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1970); *Flast v. Cohen,* 392 U.S. 83 (1968); *Citizens Committee for Hudson Valley v. Volpe,* 425 F. 2d 97 (2d. Cir. 1970); *Scanwell Laboratories, Inc. v. Shaffer,* 424 F. 2d 859 (D.C. Cir. 1970). See also Davis, *The Liberalized Law of Standing,* U. Chi.L.Rev. 450 (1970).

Turning to the facts of this case to determine whether plaintiff-appellee has standing, the Sierra Club in its complaint alleges that it is a non-profit corporation under the laws of the State of California. It claims a membership of approximately 78,000 nationally, with approximately 27,000 members residing in the San Francisco Bay

Area. It asserts that it has for many years taken a special interest in the conservation and sound maintenance of the national parks and forests and particularly lands on the slopes of the Sierra Nevada mountains. It states that "its interests would be vitally affected by the acts hereinafter described and would be aggrieved by those acts of the defendants as hereinafter more fully appears."

Up to this point there is no adversary position stated between the Sierra Club and the Secretary of Agriculture or the Secretary of the Interior. Not only do the latter have a special "interest" in the national parks and forests but they are charged by Congress pursuant to a constitutional mandate with the direct responsibility for the protection and conservation of the national parks and forests.

The club's complaint continues by outlining the recreational development proposal which constitutes the substance of its grievance. It concludes by particularizing the acts of the Secretaries which it asserts are in excess of statutory jurisdiction, are arbitrary and capricious and constitute an abuse of discretion. The proposed development and the permits to authorize it are alleged to be: (1) in violation of the statute limiting the size, terms and manner of occupation of lands for resorts and associated facilities; (2) in violation of the permit power of the Secretary of Agriculture; (3) beyond the jurisdiction of the defendants as to the National Game Refuge. In a second claim for relief the complaint asserts that a proposed highway will be built which will cross 9.2 miles of Sequoia National Park and that the authorization of this roadway is in excess of authority. In its brief the appellee complains of the proposed construction of a transmission line

within the park although this is not asserted in the complaint. The complainant does not assert that any of its property will be damaged, that its organization or members will be endangered or that its status will be threatened. Certainly it has an "interest" in the sense that the proposed course of action indicated by the Secretaries does not please its officers and board of directors and through them all or a substantial number of its members. It would prefer some other type of action or none at all. On the other hand, the United States Ski Association, the Far West Ski Association claiming 109,000 supporters, and the County of Tulare in which the development will be located, favor the action.

We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all of the citizens by two cabinet level officials of the government acting under Congressional and Constitutional authority.

The district court relied on four cases to support its position that the Sierra Club had standing. They are *Scenic Hudson Preservation Conference v. F.P.C.*, 354 F. 2d 608 (2d. Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); *United Church of Christ v. F.C.C.*, (123 U.S. App. D.C. 328), 359 F. 2d 994 (D.C. Cir. 1966); *Road Review League v. Boyd*, 270 F. Supp. 650, 661 (S.D. N.Y. 1967), and *Powelton Civic Home Owners Association v. Department of H. & U. Dev.* 284 F. Supp. 809, 825-28 (E.D. Pa. 1968).

The *Scenic Hudson* case involved a petition to set aside a license to Consolidated Edison of New York to con-

struct a pumped storage hydro-electric project on the west side of the Hudson River at Storm King Mountain. The petitioners were three towns and the Scenic Hudson Preservation Conference—an association of conservationist organizations. The license was issued by the Federal Power Commission after hearings under the provisions of the Federal Power Act in which petitioners participated as parties. Section 313(b) of the Act specifically grants to a party aggrieved by an order of the commission the right of review by the United States courts of appeals. There is no such statute involved in the present case to give standing.

In addition, the Second Circuit pointed out that several of the petitioners had sufficient actual economic interest to support their standing to obtain review. 354 F. 2d at 616-17. No such showing has been made in the present case.

The *United Church of Christ* case, *supra,* was one of a number of consumer cases. There the F.C.C. had denied to petitioners the right to intervene and, as listeners to the programming of a radio and television station to present their views in a proceeding to renew the license of that station. In that case as in other consumer cases, the court pointed out that the listeners were the persons "affected" or "aggrieved." They had standing in the same sense coal consumers were found to have standing to review a minimum price order[3] or that a transit rider had standing to appeal a fare increase.[4]

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[3] *Associated Industries v. Ickes,* 134 F. 2d 694 (2d Cir. 1943).

[4] *Bebchick v. Public Utilities Commission,* 287 F. 2d 337 (D.C. Cir. 1961).

Road Review League, supra, was a complaint to review and set aside an order of the Federal Highway Administrator establishing the alignment of an interstate highway. The plaintiffs were persons and organizations who would be directly affected by the proposed road including persons whose property would be taken. This identification of the plaintiffs is itself a statement of the distinction between that case and the one under consideration. *Powelton Civic Home Owners Association v. Department of H. & U. Dev., supra,* is the final case relied upon by the trial court. We consider it inapposite. It involved the location of an urban development project. The plaintiffs were persons whose homes and properties would be taken to implement the project. The court stated:

> "However, we are of the opinion that the plaintiffs also have standing in the more traditional sense: they have substantive legal rights conferred by the National Housing Act. They have private individual legal rights; and they are the appropriate representatives of legal rights conferred by the Housing Act on the general public." 284 F. Supp. at 821.

The *Powelton* case would be in point if the homes of residents at Mineral King were to be razed and those homeowners objected. There is no such showing.

On this appeal appellee does not limit itself to the four cases cited by the district court in support of its standing to sue. It calls attention to the recent cases decided by the Supreme Court and by the lower courts. We have examined each of these cases and others not cited, but fail to be convinced that any of them go so far as to support the standing claim here. We are not unmindful

of the Supreme Court's recent opinion in *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150 (1970), which was an action by plaintiffs, who sold data processing services to business generally, against the Comptroller of the Currency who had ruled that national banks could make their data processing services available to other banks and to bank customers. It was thus a competitor's suit and so designated by the Court. The first question to be asked by the Court was whether the Comptroller's action had caused injury in fact to the petitioners. The answer was that there was no doubt but that such injury existed or would develop in the future because the competition would entail loss of profits. Here, therefore, there was direct injury in fact, and therefore there was standing. The Court went beyond these facts in its discussion of standing generally and the effect of the Administrative Procedure Act in particular. It said that aside from the case or controversy test, standing is concerned with the question:

> "Whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153.

The significance of the language is not entirely clear. It is likewise not made clear in a companion case decided the same day and involving the same question.[5] We submit that it does not establish a test separate and apart from or in addition to the test which the Court first looked to in *Camp:*

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[5] *Barlow v. Collins,* 397 U.S. 159 (1970). See discussion of both cases in Davis, *supra.*

> "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise. There can be no doubt but that petitioners have satisfied this test. The petitioners not only allege that competition by national banks in the business of providing data processing services might entail some future loss of profits for the petitioners, they also allege that respondent American National Bank & Trust Company was performing or preparing to perform such services for two customers for whom petitioner Data Systems, Inc., had previously agreed or negotiated to perform such services." 397 U.S. at 152.

This is the test which will reconcile most if not all of the decided cases and also fit the standard of the Administrative Procedure Act. "Standing to sue," as the phrase indicates, refers to the posture of the plaintiff and not to the "legal interests" to be unravelled. The Court said in *Jenkins v. McKeithen,* 395 U.S. 411, 423 (1969):

> "In this sense, the concept of standing focuses on the party seeking relief, rather than on the precise nature of the relief sought. See *Flast v. Cohen, supra,* at 99-100. The decisions of this Court have also made it clear that something more than an 'adversary interest' is necessary to confer standing. There must in addition be some connection between the official action challenged and some legally protected interest of the party challenging that action. See *Flast v. Cohen, supra,* at 100-106."

Nor does the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and particularly Section 702, aid the appellee

here.[6] Judge Burger, now Mr. Chief Justice Burger, in a concurring opinion in *National Association of Securities Dealers, Inc. v. SEC,* 420 F. 2d 83, 101 (D.C. Cir. 1969), *cert. granted,* 397 U.S. 986 (1970), commented that the above section broadened the basis of standing, as follows:

> "Appellees also assert that § 702(a) (Supp. II, 1967), embodies an independent and self-sufficient statutory basis for standing. I do not feel that the APA was meant to arrest the development of the law of standing as of the date of its passage:
>
> '[W]e would certainly be prepared to hold in an appropriate case that one who complains of administrative action may find a remedy under the Act beyond the strict scope of judicial review recognized prior to its adoption. . . .'
>
> "Kansas City Power & Light Co. v. McKay, 96 U.S. App. DC. 273, 282, 225 F.2d 924, 933, *cert. denied,* 350 U.S. 884 (1955). *Nevertheless, although the review provisions of the APA were not meant to retard the judicial development and adaptation of the law of standing, it does not establish an independent right to review absent judicially articulated notions of 'legal wrong' of 'adversely affected or aggrieved . . . within the meaning of any relevant statute.'* See Pennsylvania R.R. Co. v. Dillon, *supra* note 2." 420 F.2d at 104 n.5. (*Emphasis supplied*).

In almost every carefully-considered case where standing is sustained it is apparent in the facts or in the opinion that when the situation of the plaintiff is examined there is an element of legal wrong being afflicted upon

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[6] "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

him or he is adversely affected by agency action or aggrieved within the meaning of a relevant statue.[7] That adverse effect, of course, need not be economic but, as the Supreme Court has recently observed, may be aesthetic, conservational or recreational. *Data Processing, supra,* 397 U.S. at 154. It is this element which appellee fails to sufficiently allege in its complaint and support by its exhibits attached. It does not allege that it is "aggrieved" or that it is "adversely affected" within the meaning of the rules of standing.[8] Nor does the fact that no one else appears on the scene who is in fact aggrieved and is willing or desirous of taking up the cudgels create a right in appellee. The right to sue does not inure to one who does not possess it, simply because there is no one else willing and able to assert it.

We do not believe that the Sierra Club's complaint alleges that it or its members possess a sufficient interest for standing to be conferred. There is no allegation in the complaint that members of the Sierra Club would be affected by the actions of defendants-appellants other than the fact that the actions are personally displeasing or distasteful to them.

In holding that the complaint fails to allege that the Club has the requisite standing to institute this action, we are aware that federal courts have accorded the Club standing to object to alleged administrative infringement upon natural resources in two recent cases: *Citizens Com-*

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[7]Davis, *supra* at 466. See also *South Hill Neighborhood Assn. v. Romney,* 421 F. 2d 454 (6th Cir. 1969), *cert. denied,* 397 U.S. 1025 (1970).

[8]"Aggrieved" is defined as "Having suffered loss or injury; damnified; injured." Black's Law Dictionary 87 (4th ed. 1968).

mittee for the Hudson Valley v. Volpe, 425 F.2d 97, (2nd. Cir. 1970) and *Parker v. United States,* 307 F. Supp. 685 (D. Colo. 1969). In both of these cases, however, the Sierra Club was joined by local conservationist organizations made up of local residents and users of the area affected by the administrative action. No such persons or organizations with a direct and obvious interest have joined as plaintiffs in this action.[9] The question of standing here must be decided from the facts in this action. We hold that they do not establish the interest necessary for that purpose.

(2) *The merits*

Apart from questions of standing, an order granting a preliminary injunction must be based upon established equitable grounds. "The grant of a preliminary injunction is the exercise of a very far reaching power never to be indulged except in a case clearly warranting it." *Dymo Industries, Inc. v. Tapeprinter, Inc.,* 326 F.2d 141, 143 (9th Cir. 1964). In order to obtain such relief, particularly against the discretionary action of an official of cabinet rank, the plaintiff must establish a strong likelihood or "reasonable certainty" that he will prevail on the merits at a final hearing. *Garlock, Inc. v. United Seal, Inc.,* 404

[9]To the extent to which *Citizens Committee for Hudson Valley v. Volpe,* indicates that the Sierra Club has standing within the "private Attorney Generals" rule, we respectfully disagree. We believe that rule is limited as it states to cases where Congress has enacted a statute "conferring on any non-official person, or on a group of non-official persons, authority to bring a suit" to prevent unauthorized official action. See, *Scanwell Laboratories, Inc. v. Shaffer,* 424 F. 2d at 864. We find no indication in any federal statute that Congress has "conferred" on the Sierra Club or any group like it, authority to bring suits to challenge official action.

F.2d 256, 257 (6th Cir. 1968); *H. E. Fletcher Co. v. Rock of Ages Corp.*, 326 F.2d 13, 17 (2d Cir. 1963).

> "It is a cardinal principle of equity jurisprudence that a preliminary injunction shall not issue in a doubtful case. Unless the court be convinced with reasonable certainty that the complainant must succeed at final hearing the writ should be denied." *Hall Signal Co. v. General Ry. Signal Co.*, 153 F. 907, 908 (2d Cir. 1907).

In addition, before such a writ should issue, the applicant must show that it will suffer irreparable injury. The court must balance the damage to both parties. *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969). The injunction must rest upon a convincing presentation and, because of this, an appellate court may reverse an order granting a preliminary injunction where the appellee's showing is something less than the persuasive demonstration upon which an injunction must be predicated. *District 50 UMW v. International Union, UMW*, 412 F.2d 165, 167 (D.C. Cir. 1969); *Udall v. D.C. Transit System, Inc.*, 404 F.2d 1358, 1360-61 (D.C. Cir. 1968). As will appear, the appellee herein has shown neither a reasonable certainty that it will prevail nor irreparable injury.

We recognize that in appraising these issues, even upon a preliminary basis, our function is not to make an original judgment or to make a final decision on the merits. See, e.g., *Public Service Commission of Wisconsin v. Wisconsin Telephone Co.*, 289 U.S. 67, 70 (1933); *Industrial Bank of Washington v. Tobriner*, 132 U.S. App. D.C. 56, 405 F.2d 1321, 1324 (D.C. Cir. 1968). The district court has done this. The function of this court on appeal is

to determine whether in that original preliminary injunction there has been an abuse of sound discretion of the district court. *Washington Capitols Basketball Club Inc. v. Barry,* 419 F.2d 472, 475 (9th Cir. 1969); *Ross Whitney Corp. v. Smith Kline & French Labs.,* 207 F.2d 190, 194 (9th Cir. 1953).

The district court has first considered the development in the light of the permits which are to be issued by the Secretary of Agriculture and has concluded that it "may involve a violation not only of the letter, but also the purpose and intent" of the applicable law. The court directed its attention particularly to the use by the Secretary of his authority to issue permits to accomplish the objectives sought. Examining the same documentation in the light of the established practices of the Secretary, we respectfully come to a different conclusion.

The proposal of Disney and the action taken by the Secretary is to permit a land use of forest lands by the issuance of two types of permits. The first type is a term permit for an aggregate of eighty acres with a maximum term of thirty years. The second is called a "revocable permit", meaning the Secretary imposes no limitation on time or acreage.

The district court has concluded that Congress has never expressly authorized revocable permits and that the only authority to issue them is under the general power to regulate the forests and under a 1928 Attorney General's opinion. Upon such a tenuous base, the broad application which is proposed here becomes questionable to the lower court. We find the Secretary's authority rests upon much firmer ground.

Originally the management of the lands reserved for national forests was under the supervision of the Secretary of the Interior. In 1905 these powers were transferred to the Secretary of Agriculture,[10] and he was given authority to make rules and regulations to preserve the forests from destruction.[11] As early as May 31, 1905, the Secretary of Agriculture was advised by the Attorney General that he had the authority to issue revocable permits.[12]

This permit authority under the Secretary's general regulatory power was upheld by the Supreme Court in *United States v. Grimaud,* 220 U.S. 506 (1911). At the time of the amendment of 16 U.S.C. § 497 in 1956 to authorize the issuance of term permits for eighty acres for thirty years, the House Report commented on the practice of the Secretary to issue revocable permits under his general regulatory powers, saying:

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[10]Act of Feb. 1, 1905, Ch. 288, 33 Stat. 628.

[11]Act of June 4, 1897, 30 Stat. 35.

[12]An application for a permit to occupy forest lands for use in conducting a fish salter, oil and fertilizer plant was made to the Secretary. He requested an opinion from the Attorney General as to his authority. Replied the Attorney General:

> "It would therefore seem that when, in the exercise of that discretion, you determine that the granting of a permit to use and occupy a reservation for a specified purpose is consistent, according to your judgment, with insuring the objects for which the reservation was created, then your decision in the premises is definitive and subject to review in no other way than by the Congress from which your power to act was derived. Answering your first question therefore, I have to advise you that, in my opinion, you possess authority to grant a permit for such a purpose as that set forth in the application referred to by you."

In the same opinion, with respect to an inquiry as to the time for which such a permit might be issued, the Attorney General responded ". . . the permits should not be given for a longer period than, under the circumstances of each case would seem reasonable." 25 Op. Att'y Gen. 470, 472 (1905).

"The Department of Agriculture now has adequate authority to issue revocable permits for all purposes under the act of June 4, 1897 (16 U.S.C. 551)." House Report No. 2792, U.S. Code Cong. & Ad. News, p. 3635 (1956).[13]

The court below has understandably relied upon the authority of the opinion of the Attorney General to the Secretary of War, 35 Op. Atty. Gen. 485 (1928). That opinion is the basis for the court's discussion of the necessity that a revocable permit be terminable "at will" and that therefor *this* permit is not properly issued. We have found no such limitation apart from this Attorney General's opinion. The same erroneous premise results in the district court's concern about the removability of any improvements placed upon the land covered by the revocable permit. It is at the bottom of the district court's conclusion that a combination of a term permit and a revoc-

[13]The district court has cited and relies upon an opinion of the Attorney General in 1928 as one which "narrowly" restricts the implied power of the Secretary of Agriculture to issue revocable permits. 35 Op. Att'y Gen. 485 (1928). This opinion for some inexplicable reason was cited to the district court by the defendants. It had nothing to do with the authority of the Secretary of Agriculture under the statute granting him power over the forests. It was an opinion addressed to the Secretary of War in answer to an inquiry as to whether the Secretary of War had the authority to grant to the Southern Pacific Railroad Co. a permit to construct a railroad line across a portion of a California military reservation. The Attorney General pointed out that the Secretary of War had no power to grant any permanent estate for railroad purposes and no express statutory authority to grant revocable licenses or permits. The opinion also pointed out a long administrative practice in granting some revocable permits and then in the guarded language quoted by the trial court below, opined that in very limited circumstances such a revocable permit might be granted. Counsel for the Secretary of Agriculture apparently cited this opinion for lack of one directly in point. It need not have done so. As the district court pointed out, the opinion adds nothing to the Secretary's case.

able permit may be an impermissible and unlawful exercise of administrative authority. Beginning from a correct premise that the revocable permit is an approved device for forest management under Congressional mandate from the Attorney General, the Supreme Court and the Congress, we believe an entirely different conclusion would have been reached. The fact that the record discloses that there are now a total of at least eighty-four recreational developments on national forest lands in which there is such a combination of the term permit and the revocable permit is convincing proof of their legality.[14] Many of these developments are ski developments making use of maximum acres of the term permit plus revocable permits for additional acreage in amounts in some cases in excess of 6,000 acres. See the United States Forest Service tabulation in Appendix, Brief of Amicus Curiae Ski Association. It seems apparent, as was obvious to both Senate and House Committees, that the eighty-acre long-term permit was a necessity to obtain proper financing for substantial permanent improvements, while developments of less magnitude and permanency, such as trails, slopes, corrals, could be placed upon lands held under revocable permits.[15] We find no indication in those reports that ski lifts are limited to the term permits. The planned development in the instant case discloses that most major improvements are to be located upon lands held under the eighty-acre term permits while lifts and trails will be in-

[14]Affidavit of W. S. Davis, Assistant Regional Forester, California Region, Record p. 238. See *Udall v. Tallman*, 380 U.S. 1 (1965), which holds that great deference must be given to interpretations of statutes of officers or agencies charged with their administration.

[15]See Senate Report No. 2511, Record p. 298; House Report No. 2792, Record p. 293.

stalled "throughout about 13,000 acres."[16] Evidence of great concern for the ecology of the area and the preservation and conservation of natural beauty and environmental features appears throughout the planning reports attached as exhibits. We find little or no liklihood of success in opposing the proposed development upon the ground that there would be an illegal use of term and revocable permits.

A. *Permit for Highway*

The district court next discusses the proposal of the Secretary of Interior to issue a permit to the State of California to construct a segment of roadway through the national park. The road proposed is one from an existing state highway (Cal. 198) to Mineral King. No cases have been cited to illustrate the alleged impropriety of this permit to cross 9.2 miles of national park lands in the twenty mile route from Three Rivers to Mineral King. We know of none. In fact, there is an existing road from Three Rivers to Mineral King which traverses the same park. That road is a narrow substandard roadway with sharp switchbacks rising from an elevation of 1,160 feet at its junction with Route 198 to an elevation of 7,830 feet at Mineral King. Most of it has oiled surface with a portion graded only. It does not qualify for state maintenance (Record 101). The proposed road follows the alignment of the old road to some extent and substantially parallels it in others. The record shows a great deal of concern in its planning for preservation of aesthetic and

[16]The gross acreage of Sequoia National Forest is 1,178,767 acres, which does not include areas within Sequoia National Park or King's Canyon National Park.

ecological values. The defendant Superintendent of the National Park concerned has stated under oath that the construction will be engineered.

> ". . . so that there will be a minimum impact on the national park values. The alignment of the road will be carefully selected to protect the Sequoia trees, natural areas, existing drainage ways, and the overall ecology of the area." (Record 251; see also as to Sequoia trees and wild-life, Record p. 103-104.)

No question is raised as to the wide discretion given to the Secretary of the Interior in managing national parks to construct and improve roads and trails therein. See 16 U.S.C. § 8. We know of no law and find little logic in a contention that a twisting, substandard, inadequate road through 9.2 miles of the park is legal but that an improved all weather two lane highway along a new but approximately parallel alignment is illegal. No authorities have been cited in support of such a position. We cannot find in the appellee's contentions concerning this proposed road any degree of substantiality.

B. *Permit for Transmission Line*

Although not alleged in the complaint, appellee has questioned in its brief and the district court has alluded to the proposal of the Secretary of the Interior to grant permission for a right of way for a power line to provide electrical power for uses in connection with the project. Again, with deference, we fail to find this a substantial issue upon which to base the grant of a preliminary injunction. It seems unlikely that the appellee could prevail as to such a contention. Under 16 U.S.C. § 5 authority is

clearly provided to the Department of the Interior in its management of parks to grant permits and easements for rights of way for "electrical poles and lines for the transmission and distribution of electrical power." It is suggested, however, that under 16 U.S.C. § 45 (c) such a permit may not be issued without an act of Congress. This latter section does apply specifically to Sequoia National Park. It recognizes in the first portion of the section, existing valid claims for homesteads, mineral rights or rights for any other purposes whatsoever; it then gives to the Secretary authority to issue permits for timber cutting and grazing and concludes with a proviso that:

> ". . . no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits of said park as constituted by said sections, shall be granted or made without specific authority of Congress."

The Secretary contends that this section was intended to apply only to the construction and development of hydroelectric projects and related facilities including power lines. In the context of 16 U.S.C. § 5 and the unlikely intention to require an act of Congress for each electrical line within the park we accept the argument of the Secretary as convincing.

C. *Public Hearings*

Finally, the trial court pointed to the contention of the appellee that no public hearings were ever held with respect to the highway. The existence of any such re-

quirement upon the Secretary of Interior or the Secretary of Agriculture is unclear. It does appear, however, that there was a hearing on this project in 1953. It also appears that there was a public hearing on August 10, 1967. (Record p. 96; 111; 230). The hearing was held by the California Division of Highways which would have been the permittee and was working closely with Agriculture and Interior. It is described in Exhibit F as having been a "well-publicized" public hearing attended by approximately 210 persons including California Assemblymen or their representatives, members of the Boards of Supervisors of Kern County and Tulare County, the Superintendent of Sequoia National Park, the Supervisor of Sequoia National Forest, representatives of fish and game, forest service, Federal Water Pollution Control Administration and civic and public organizations. The Sierra Club was present. It does not appear that the proposed roadway was any clandestine project. As a matter of fact, it does not appear that a permit was issued until more than a year later and then subject to agreement upon design standards. The matter of public hearings cannot be considered a substantial factor in this proceeding.

D. *The National Game Refuge*

A portion of the land within the area under consideration has been designated as a National Game Refuge. It has been suggested that this project would somehow interfere with the refuge and be in excess of authority. The act establishing the refuge declares that:

> "The hunting, trapping, killing, or capturing of birds and game or other wild animals upon the lands of

> the United States within the limits of said area shall be unlawful."

except under regulations of the Secretary of Agriculture.[17] We find no substance in this argument.

The appellee has not shown with any degree of certainty that it will or can succeed. Neither has it shown that it, or its members or anyone else will suffer irreparable injury. This is not a case "clearly warranting" the grant of a preliminary injunction. *Dymo Industries, Inc. v. Tapeprinter, Inc., supra.* 326 F.2d at 143. The nation's natural resources are not the property of any particular group. One of the basic social ills of today is that we have too many people living too close together. It appears that the friction thus created is becoming increasingly abrasive. The satisfaction of the basic necessities of such a population creates environmental problems which are not within the expertise of this court. We cannot say, however, that the Secretary of Agriculture and the Secretary of the Interior have made an arbitrary and capricious judgment in determining to make available a vast area of incomparable beauty to more people rather than to have it remain inaccessible except to a rugged few.

The Order granting the preliminary injunction is vacated and the cause is remanded for further proceedings in conformity herewith.

HAMLEY, J. (Concurring):

In my view Sierra Club has standing to prosecute this lawsuit. It seems to me that the rationale of recent Su-

[17] 16 U.S.C. § 688.

preme Court pronouncements in this area, if not the precise holdings, call for such a determination. In *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 154 (1970), as the majority itself notes, the Supreme Court made it clear that the element of legal wrong need not be economic in nature, but may be aesthetic, conservational or recreational.

The Sierra Club represents thousands of members who have a deep interest in aesthetic, conservational and recreational values of a kind intended to be safeguarded by the statutes in question, and the regulations and practices thereunder. If these statutes are being disregarded, or the regulations and practices thereunder are invalid, and the result is that the described values are being undermined or disregarded, it seems to me the Sierra Club members may assert that a legal wrong is being inflicted upon them—a wrong which their chosen organization has standing to resist in this lawsuit.

However, for the reasons stated in the last section of the majority opinion, under the heading "The merits," I am convinced that the granting of the preliminary injunction amounted to an abuse of discretion and therefore must be reversed. The trial court acted with painstaking care which is deserving of high commendation, but, in my view, there is an inadequate legal foundation for the order entered.

Appendix B

United States District Court
Northern District of California

No. 51,464

Sierra Club, a non-profit California corporation,
Plaintiff,
vs.
Walter J. Hickel, et al.,
Defendants.

MEMORANDUM OF DECISION

SWEIGERT, J.

The Forest Service, Department of Agriculture intends to issue certain permits to Walt Disney Productions, Inc., a private corporation, for the construction and maintenance of a private hotel-resort, winter-summer complex in the Sequoia National Forest known as Mineral King.

The permits will cover in excess of 1,000 acres of land and, according to plaintiff, will ultimately affect as much as 13,000 acres. It is estimated that the project will involve as high as 35 million dollars of private investment.

Mineral King, since 1926, has been, not only a national forest under the jurisdiction of the Forest Service, Department of Agriculture, but also a national game refuge by special designation of the Congress (26 Stat. Chap. 744).

The permits are to be issued as soon as construction contracts are executed by the State of California for the construction of a substantial segment of a proposed public highway through the adjoining Sequoia National Park which is under the jurisdiction of the National Park Service, Department of the Interior.

The National Park Service intends to issue to the Division of Highways, State of California, a permit for the construction of a new all-weather, high-speed highway, estimated to accommodate 1200 vehicles per hour each way, through the Sequoia National Park as the most economically feasible means of providing motorist highway connection between the California highway system and the proposed Mineral King hotel-resort project which is located, not within the national park, *but* in the adjoining national forest game refuge.

The case is presently before the court on plaintiff's application for a preliminary injunction restraining the defendant federal agencies from issuing the permits in question.

The Forest Service Permits for the Resort-Hotel Project

The permits about to be issued by the Forest Service will, in effect, enable the Developer to construct and maintain a winter-summer, hotel-resort project which, including its "elbow room" for related facilities, will comprise admittedly over 1,000 acres and, as claimed by petitioner, may affect 13,000 acres of forest-game refuge land.

This is to be accomplished by the device of using two kinds of permits: (1) a 30 year-80 acre "term" permit for "most of the major facilities," and (2) a separate

so-called "revocable" permit covering an additional 1,000 acres for "other major facilities, e.g., ski lifts, towers, refuse and sewer disposal, parking areas and roads" for use in conjunction with the resort covered by the 30 year-80 acre term permit.

Title 16 U.S.C. § 497 provides, as far as applicable here, that the Secretary of Agriculture is authorized "to permit the use and occupancy of suitable areas of land within the national forest, *not exceeding 80 acres,* and for periods not exceeding 30 years, for the purpose of constructing or maintaining hotels, resorts or other structures or facilities necessary or desirable for recreation, public convenience and safety." (emphasis added)

The section makes similar provision for industrial and commercial purposes related to or consistent with other national forest uses; also similar provisions for state agency public uses; also similar provision for summer homes and stores, except that in this latter case the acreage limitation is 5 acres.

The legislative history of Section 497, first adopted in 1915, amended in 1948 and broadened to its present form in 1956, indicates quite clearly that, although its purpose has been to grant the Secretary of Agriculture power to issue *term* permits for certain kinds of specified uses, its purpose has been also, and equally important, to restrict term permits for those uses *timewise,* i.e., 30 years for any use, and *areawise* to 5 acres for summer homes and stores, and (since 1956) 80 acres for the uses specified in the kind of usage here involved, i.e., hotels, resorts and other structures or facilities necessary or desirable for recreation, public convenience or safety.

It is also clear from the legislative history that the 80 acre limitation on hotels and resorts was intended to include, not only the resort or hotel, itself, but also any and all structures or facilities related to it, e.g., "elbow room" for ski lifts and other related service facilities. See, *1948 U.S. Code Cong. & Ad. News,* pp. 1337-1338; *1956 U.S. Code Cong. & Ad. News,* pp. 3334-3336.*

It is also clear from the legislative history that in 1948 Congress refused to broaden (except for Alaska), the pre-existing 5 acre limitation for any permit for any purpose and did *not,* in fact, enlarge the acreage provision from 5 to 80 acres with respect to resort-hotel use of forest land in the United States until 1956 upon the representation that the requirements of commerce, industry, recreation and public use of space in the national forests had substantially changed. (See, 1958 U.S. Code Cong. & Ad. News, p. 3336).

It is also clear from the legislative history that in 1956 the Secretary represented to the Congress that his authority to issue "revocable" permits was adequate only "for uses for which long term tenure is unnecessary or *undesirable.*" (U. S. Code Cong. & Ad. News, p. 3636).

The question arises whether this dual permit device is intended to circumvent the clear 80 acre limitation of Section 497 and thereby accomplish what would be in effect a violation of the section.

It will be noted that Section 497, which imposes the 80 acre limitation, does not differentiate between different

*See Defendants' Responding Brief of 7/14/69, attachment No. 1 at p. 3, Letter of 8/5/55, Acting Secretary of Agriculture to Chairman, Senate Committee on Agriculture and Forestry.

kinds of permits. It broadly refers to any "permit" for the specified uses.

So far as so-called "revocable" permits are concerned, Congress has never expressly authorized them. Agriculture claims authorization for them only under its general power to so regulate the forest lands as "to preserve the forests thereon from destruction" (16 U.S.C. § 551) and under an Attorney General's Opinion of 1928. (35 Op. A.G. 485 [11/27/28]).

That opinion, while recognizing an implied power to issue them, narrowly restrict their use to situations in which such a permit is (1) made expressly revocable at will by its terms, and (2) the permitted structures are capable of being removed in case of revocation, and (3) the permitted use will not permanently damage or destroy the land for government use, and (4) the permitted use will be of direct benefit to the United States.

It is questionable whether the so-called "revocable" permits to be used by Agriculture in the present case meet the strict standards prescribed by the Attorney General.

In the first place they are not by their terms expressly made terminable "at will." Clause 15 merely provides that "This permit may be terminated upon breach of any of the conditions herein *or at the discretion* of the Regional Forester or the Chief of the Forest Service." (emphasis added)

Any such revocation is made subject to administrative appeal under Agriculture's own regulations. (36 CFR 211.20-211.119). Also, the Forest Service Manual (FSM

2711.2-5; 10/68), while stating that these permits are "generally for use of short duration," adds that "They will be limited to the time actually needed for exercising the use privileges."

These provisions strongly suggest to the Developer that the so-called "revocable" permit is not really revocable "at will" and that any discretionary revocation thereof must be reasonable in the light of all the circumstances, including the time actually needed for exercising the use privileges covered thereby—use privileges which in the present case are so coupled with the 30 year term permit that the time actually needed for exercising them would obviously be at least 30 years.

Clause 11 provides that "Upon abandonment, termination or revocation or cancellation of this permit the permittee shall remove within a reasonable time all structures and improvements . . . and shall restore the site unless otherwise agreed upon in writing or in this permit. . . ." There is no requirement that the structures shall in fact be capable of such removal or that the use will not be in fact such as to permanently destroy or damage the land for government use.

Further, the uses granted to the Developer by the two purportedly separate permits admittedly relate to a single, unified project and are obviously interlocked and interrelated.

It is inconceivable that Agriculture would, or could under the terms of the "revocable" permit and the circumstances of its issuance, suddenly and "at will" require the Developer to remove ski lifts, towers, refuse and

sewage disposal, parking areas and roads covered by that permit and thus effectively destroy the 35 million dollar investment made by the Developer under his 30 year-80 acre term permit.

The very opinion of the Attorney General relied on by Agriculture warns of just such a possible danger to the public interest in granting revocable permits, saying: "In cases where it appears that the permittee intends to make substantial improvements the removal of which would cause him a great loss in case of revocation of the permit, it is a matter of departmental policy whether a situation should be created by the issue of a permit which may afterwards embarrass the head of the department in the exercise of the powers of revocation."

For the foregoing reasons we conclude that the proposal of Agriculture in the pending case, if carried out, may involve a violation not only of the letter, but also the purpose and intent of Section 497 so far as its 80 acre limitation is concerned.

To hold otherwise would be to assume that the Congress when enacting and amending this acreage limitation, contemplated that it could be circumvented, even nullified, by the device of coupling two different kinds of permits for a single, unified, private hotel-resort development, occupying more than 1,000 acres of a forest game refuge area. If Congress had any such situation in mind, it could have spared itself time and trouble by omitting any area limitation—or by otherwise indicating its intent. Certainly Congress could not have been so naive as to think that "revocable" permits, issued under such circumstances, would *really* be revocable.

National Park Service—Permit for the Highway

Interior proposes to issue to the Division of Highways, State of California, a permit for the construction of a highway *through* the National Park to connect the California Highway system with the Mineral King development, which is located, not within the Park, but outside of it in the national forest game refuge area.

Interior is entrusted with administration of the national park system by such means and measures as conform to the fundamental purpose of said parks, i.e., to conserve the scenery and the natural and historic objects and wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations (16 U.S.C. § 1) and, specifically, as to Sequoia National Park, for the preservation from injury of all timber, mineral deposits, natural curiosities and wonders and their retention in their natural condition. 16 U.S.C. § 43.

There can be no doubt that Interior has the power to construct and improve roads and trails in the national parks (16 U.S.C. § 8) and that, the wide discretion of Interior in that respect should not ordinarily be interfered with.

It appears, however, that in May, 1968, Interior adopted certain Park Road Standards providing that park roads are *not* continuations of state and federal highway network; that they should not be designed to serve as connecting links for routing motorists through the parks to reach ultimate destinations or simply as a connecting device to link points of interest and, further, that a professional ecological determination must precede approval of road construction and design to make sure that

resulting effects on wildlife, drainage, stream flow and climate will be minimal.

Plaintiffs also cite a 1962 House Committee Report of the Congressional Committee of Interior and Insular Affairs (dealing with the Padre Island National Seashore) stating that construction therein of a through highway for general public convenience would give that project a function which does not belong to it and that such a roadway might spoil its very purpose.

In the present case the record shows that the proposed highway, so far as it will cut through Sequoia National Park, is designed and intended, not as an adjunct to the National Park, itself, but as a connecting link to route motorists through the Park to reach an ultimate destination outside the Park—the proposed, private Mineral King resort-hotel complex in the adjoining forest game refuge area.

Thus, the question arises whether the particular highway here in question is fairly within the power of Interior as interpreted by its own standards.

National Park Service—The Transmission Line

It further appears from the record that Interior proposes to permit construction of a 66,000 volt power line across the National Park in order to enable the Developer to obtain necessary electric power for the project.

Title 16 U.S.C. § 45(c), which applies specifically to Sequoia National Park, provides that no permit for transmission lines or for the transmission of power within the Park limits shall be granted or made *without specific authority of Congress.*

Interior contends that this statute was intended to apply only to the construction and development of hydro-electro projects within the Park and does not preclude him from granting rights-of-way across park lands for transmission lines under the general power granted Interior by Title 16 U.S.C. § 5 to grant rights-of-way across public lands of the United States for electrical poles and lines for the transmission of electric power, provided that such right-of-way shall be allowed within or through any national park only upon approval of the chief officer of the department and upon a *finding* that the same is not incompatible with the public interest.

It will be noted, however, that this latter section is a general statute while Section 45(c), deals specifically with Sequoia National Park and, without making any distinction between electric projects within or without the Park, clearly provides that, so far as that Park is concerned, there shall be no permit for any transmission line or for the transmission of power within the Park limits without specific Congressional authority.

Thus, there arises the further question concerning the power of Interior to permit the transmission line—absent specific authority from Congress.

Failure to Hold Public Hearings

Plaintiff contends that no public hearings were ever held by either the Forestry Service with respect to the Mineral King Development or by Interior with respect to the highway or transmission line.

It appears from the record that in March, 1953, Congressman Hagan conducted a hearing at Visalia to determine what could be done to expedite development

of Mineral King. There is, however, no record of any public hearing called or conducted by either the Forestry Service or by Interior.

Whether Forestry Service was required by law to hold such hearings is not clear.

As to Interior, however, plaintiffs contend that it has violated its own rule (34 Fed. Reg. 19 [1/29/69]), calling for both corridor and design public hearings with respect to any major road project that would have a substantial social, economic or environmental effect.

Plaintiff contends that a purported "revocation" of that rule by the new Secretary on April 26, 1969 (34 Fed. Reg. 6985)[1] was ineffective because there was no compliance by the Secretary with the Administrative Procedure Act (5 U.S.C. § 553(b)(c)), providing for publication of general notice of proposed rule making in the Federal Register (553(b)) and opportunity for interested persons to participate in the rule making (553(c)).

"Rule making" is defined by the Administrative Procedure Act (5 U.S.C. § 551(5)) to include, not only the formulation or amendment of rules, but also the "repealing" of rules.

Interior contends that the requirements of 5 U.S.C. § 553(b)(c) are not applicable to rule making on "a matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts" (see, Sec. 553(a)(2)), or to "interpretive rules, general statements of policy or rules of agency organization, procedure or practice." (See, Sec. 553(b)(a)).

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[1]A press release of April 26, 1969 states that the reason for this purported revocation was to provide *even broader public review* and comment—not just on road building, but on all phases of the national park system.

Thus, there is presented the further question whether repeal, without general notice, of the pre-existing rule calling for public hearing concerning major road projects having substantial, social, economic or environmental effects, is a mere rule of procedure, practice or policy and, if not, whether Interior was required by its own rule to conduct public hearings on the highway in question.

Plaintiff's Standing to Sue

Defendants contend that plaintiffs have no standing to sue because they have nothing more than a general interest in common with all citizens and cannot show that any private, substantive legally protected interest of theirs is being directly invaded within the meaning of such cases as *Associated v. Ickes,* 134 F.2d 694 (C.A. 2d 1943); *Anti-Facist v. McGrath,* 341 U.S. 123, 140-41, 151-52 (1951); *Perkins v. Lukins,* 310 U.S. 113, 125 (1940); *Associated v. Camp,* 406 F.2d 837, 838 (8th Cir. 1969).

We are of the opinion, however, that plaintiff, Sierra Club, a non-profit California corporation, organized and existing for the purposes described in its complaint (Par. 3), may be held to be sufficiently aggrieved to have standing as a plaintiff herein. See, *Scenic v. FPC,* 354 F.2d 619 (2d Cir. 1965); *United Church v. FCC,* 359 F.2d 994 (D.C. 1966); *Road League v. Boyd,* 270 F.Supp. 650, 661 (N.Y. 1968); *Powelton v. HUD,* 284 F.Supp. 809, 825-828 (Pa. 1968).

Propriety of Preliminary Injunction

Defendants rest largely on the argument that there is no such urgency as would justify a preliminary injunction at this time.

It appears from the record that the National Park Service permit for construction of the highway by the State of California is ready for issuance at any time and, when issued, will authorize the State of California to proceed at any time thereafter with highway construction.

Affidavits presented on behalf of defendants indicate that the State of California will not actually be in a position to take bids for the highway construction until May 1, 1970 and that actual highway construction can not actually begin until July 1, 1970.

It appears, however, that as soon as Interior grants the highway permit, the State of California, which is not a party to this action and, therefore, not amenable to orders of this court, will be in a position to control the time within which highway construction contracts will be let and thus in effect determine the time when Agriculture must issue its permits to the Developer for construction of the Mineral King project.

In view of the possibility that Interior may issue the highway permit at any time, thereby substantially changing the existing situation and setting events in motion, plaintiff should not be left to "watchful waiting" upon the State of California. We find, therefore, that there is a sufficient showing of imminent and irreparable injury to require pendente lite relief.

Conclusion

It is true that the scope of judicial review over officials to whom Congress has entrusted the control and management of public lands is a particularly narrow one in which

there is, perhaps, less reason for interference with administrative discretion than in any other kind of administrative action. *Ickes v. Underwood,* 141 F.2d 546, 548 (C.A. D.C. 1944).

Nevertheless, we find that plaintiff has raised questions, concerning possible excess of statutory authority, sufficiently substantial and serious to justify a preliminary injunction against both Agriculture and Interior pending trial of these issues on the merits or the further order of this court.

It is beside the point to argue, as do defendants, that a preliminary injunction in this case would interfere with progress by raising doubts about the validity of similar arrangements made with respect to 84 other recreation areas, including 5 in California.

This court is not concerned with the controversy between so-called progressives and so-called conservationists. Our only function is to make sure that administrative action, even when taken in the name of progress, conforms to the letter and intent of the law as laid down by Congress and which only the Congress can change whenever it finds such change to be in the public interest.

Plaintiffs' motion for preliminary injunction is granted.

Dated: July 23rd, 1969.

W. T. Sweigert,
United States District Judge

Filed July 23, 1969,
Clerk, U.S. Dist. Court, San Francisco.

Appendix C

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Article IV, Section 3, Clause 2. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Administrative Procedure Act (as amended Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 381; 5 U.S.C. §§ 551-706):

5 U.S.C. § 551. Definitions:

For the purpose of this subchapter—

* * *

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

* * *

5 U.S.C. § 553:

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

• • •

5 U.S.C. § 702:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency

action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 703:

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 U.S.C. § 704:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 705:

When an agency finds that justice so requires, it may postpone the effective date of action taken by it,

pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 706:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

16 U.S.C. § 1:

There is created in the Department of the Interior a service to be called the National Park Service, which shall be under the charge of a director. The Secretary of the Interior shall appoint the director, and there shall also be in said service such subordinate officers, clerks, and employees as may be appropriated for by Congress. The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified, except such as are under the jurisdiction of the Secretary of the Army, as provided by law, by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations. 39 Stat. 535; 48 Stat. 389.

16 U.S.C. §5:

The head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a

period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for communication purposes, and for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to the extent of two hundred feet on each side of the center line of such lines and poles and not to exceed four hundred feet by four hundred feet for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right-of-way herein granted for any one or more of the purposes herein named: *Provided,* That such right-of-way shall be allowed within or through any national park or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided further,* That all or any part of such right-of-way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

Any citizen, association, or corporation of the United States to whom there has been issued a permit, prior to March 4, 1911, for any of the purposes specified herein under any law existing at that date, may obtain the benefit of this section upon the same terms and conditions as shall be required of citizens, associations, or corporations making application under the provisions of this section subsequent to said date. 36Stat. 1253; 66 Stat. 95.

16 U.S.C. § 8:

The Secretary of the Interior, in his administration of the National Park Service, is authorized to construct, reconstruct, and improve roads and trails, inclusive of necessary bridges, in the national parks and monuments under the jurisdiction of the Department of the Interior. 43 Stat. 90.

16 U.S.C. § 41:

The tract of land in the State of California known and described as township numbered 18 south, of range numbered 30 east, also township 18 south, range 31 east; and sections 31, 32, 33, and 34, township 17 south, range 30 east, all east of Mount Diablo meridian, is reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States, and dedicated and set apart as a public park, or pleasure ground, for the benefit and enjoyment of the people; and all persons who shall locate or settle upon, or occupy the same or any part thereof except as hereinafter provided [in section 43 of this title], shall be considered trespassers and removed therefrom. 26 Stat. 478.

16 U.S.C. § 45c:

Nothing herein contained [in section 45a or 45b of this title] shall affect any valid existing claim, location, or entry heretofore established [prior to July 3, 1926], under the land laws of the United States, whether for homestead, mineral, right-of-way, or any other purpose whatsoever, or shall affect the rights of any such claimant, locator, or entryman to the full use and enjoyment of his land: *Provided,* That under rules and regulations to be prescribed by him the Secretary of the Interior may issue permits to any bona fide claimant, entryman, landowner, or

lessee of land within the boundaries herein established [by sections 45a-45e of this title] to secure timber for use on and for the improvement of his land; and he shall also have authority to issue, under rules and regulations to be prescribed by him, grazing permits and authorize the grazing of livestock on the lands within said park at fees not to exceed those charged by the Forest Service on adjacent areas, so long as such timber cutting and grazing are not detrimental to the primary purpose for which such park is created: *Provided,* That no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits of said park as constituted by said sections, shall be granted or made without specific authority of Congress. 44 Stat. 820.

16 U.S.C. § 497:

The Secretary of Agriculture is authorized, under such regulations as he may make and upon such terms and conditions as he may deem proper, (a) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety; (b) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding five acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining summer homes and stores; (c) to permit the use and occupancy of suitable areas of land within the national forest, not exceeding eighty acres and for periods not exceeding thirty years, for the pur-

pose of constructing or maintaining buildings, structures, and facilities for industrial or commercial purposes whenever such use is related to or consistent with other uses on the national forests; (d) to permit any State or political subdivision thereof, or any public or nonprofit agency, to use and occupy suitable areas of land within the national forests not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining any buildings, structures, or facilities necessary or desirable for education or for any public use or in connection with any public activity. The authority provided by this section shall be exercised in such manner as not to preclude the general public from full enjoyment of the natural, scenic, recreational, and other aspects of the national forests. 70 Stat. 708.

16 U.S.C. § 551:

The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the said Act of March third, eighteen hundred and ninety-one [provisions of section 471 of this title], and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of sections 473-482 of this title or such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both. Any person charged with the violation of such rules and regulations may be tried and sentenced by any United States commissioner specially designated for that purpose by the court by

which he was appointed, in the same manner and subject to the same conditions as provided for in Title 18 United States Code, Section 3401, subsections (b), (c), (d), and (e), as amended. 30 Stat. 35; 76 Stat. 1157; 78 Stat. 745.

16 U.S.C. § 688:

All parts of township 17 south, ranges 31 and 32 east, and township 18 south, range 31 east, Mount Diablo base and meridian, which are north of the hydrographic divide passing through Farewell Gap, and which are not added to and made part of the Sequoia National Park by the provisions of this Act [sections 688-689d of this title], are hereby designated as the Sequoia National Game Refuge, and the hunting, trapping, killing, or capturing of birds and game or other wild animals upon the lands of the United States within the limits of said area shall be unlawful, except under such regulations as may be prescribed from time to time by the Secretary of Agriculture: *Provided,* That it is the purpose of this section to protect from trespass the public lands of the United States and the game animals which may be thereon, and not to interfere with the operation of the local game laws as affecting private or State lands: *Provided further,* That the lands included in said game refuge shall continue to be parts of the Sequoia National Forest and nothing contained in this section shall prevent the Secretary of Agriculture from permitting other uses of said lands under and in conformity with the laws and rules and regulations applicable thereto so far as may be consistent with the purposes for which said game refuge is established. 62 Stat. 861.

The Secretary of the Interior's Rules for Roadbuilding in National Parks, F.R. Doc. 69-1177; Filed Jan. 28, 1969, read in relevant part as follows:

Office of the Secretary

ROADBUILDING IN NATIONAL PARKS

Adoption of Procedures

The procedures adopted herein are designed to ensure effective public participation in determining the location and design of major road projects in the National Park System administered by the Department of Interior. In addition, they require that full consideration be given to the potential social, economic, and environmental effects of each proposed project.

The following procedures are adopted, effective immediately, and apply to all major road projects in the National Park System administered by the Department of Interior.

(1) Coordination required. When the National Park Service begins considering the development or improvement of a major road it shall solicit the views of those Federal, State, and local agencies that it believes might be interested or affected by the development or improvement. A mailing list will be maintained upon which any such agency may enroll, upon request, to receive notice of projects in any area specified by that agency.

(2) Public hearings required. a. Both a corridor public hearing and a design public hearing will be held, or an opportunity afforded for those hearings, with respect to each major road project that:

(1) Is on a new location; or

(2) Would have a substantial social, economic, or environmental effect.

b. A single combined corridor and design public hearing will be held, or the opportunity for such a hearing afforded, on all other projects before a location is approved, except as provided in subparagraph 2.c below.

c. Hearings are not held on a project that is solely for such improvement as resurfacing, widening existings lanes, adding auxiliary lanes, replacing existing grade separation structures, and installing traffic control devices or similar improvements, if the project would not have a substantial social, economic, or environmental effect.

d. An opportunity for another public hearing will be afforded in any case where proposed locations or designs are so changed from those presented, in the notices specified below or at a public hearing, as to have a substantially different social, economic, or environmental effect.

* * *

(7) Definitions. a. A "corridor public hearing" is a public hearing that:

(1) Is held to ensure that an opportunity is afforded for effective participation by interested persons in the process of determining the need for and the general location of, a major road; and

(2) Provides a public forum that affords a full opportunity for presenting views on each of the proposed alternative locations, and the social, economic, and environmental effects of those alternate locations.

b. A "design public hearing" is a public hearing that:

(1) Is held after the major road location has been approved, but before design approval;

(2) Is held to ensure that an opportunity is afforded for effective participation by interested persons in the process of determining the specific location and major design features of a major road; and

(3) Provides a public forum that affords a full opportunity for presenting views on alternative de-

sign features, including the social, economic, environmental, and other effects of alternate designs.

c. "Social, economic, and environmental effects" means the direct and indirect benefits or losses such as:

(1) Public health, safety and welfare.

(2) Conservation, including erosion, sedimentation, wildlife and general ecology of the area.

(3) Use of recreational areas and parks.

(4) Natural and historic landmarks.

(5) Aesthetics.

(6) Noise, and air and water polution.

(7) Fire protection.

(8) Fast, safe, and efficient transportation.

(9) Engineering, right-of-way, and construction costs of the project and related facilities.

(10) Maintenance and operating costs of the project and related facilities.

(11) Operation and use of existing road facilities and other transportation facilities during construction and after completion.

d. "Major roads" means the main entrance roads and arteries of the park circulation system.

This list of effects is not meant to be exclusive, nor does it mean that each effect considered will be given equal weight in making a determination upon a particular major road location or design.

Issued in Washington, D.C., on January 18, 1960.

STEWART L. UDALL,
Secretary of Interior